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Issue Date: 02 July 2007

CASE NO.: 2006-LHC-00477

OWCP NO.: 14-137169

In the Matter of:

D.T.,
Claimant,

vs.

ROGERS TERMINAL & SHIPPING CORPORATION,
Permissibly Self-Insured Employer.

Appearances:

Charles Robinowitz, Esq.
For the Claimant

William M. Tomlinson, Esq.
For the Employer

Before: Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. ("the Act"). Claimant D.T. ("Claimant") seeks compensation and medical benefits for a left shoulder injury which he sustained in the course and scope of employment with Employer Rogers Terminal & Shipping Corporation ("Employer").

A hearing was held on July 12, 2006, in Portland, Oregon. Both parties were represented by counsel. Claimant's exhibits ("CX") 1-28, Employer's exhibits ("EX") 1-84, and Administrative Law Judge exhibits ("ALJX") 1-6 were admitted into evidence. TR at 6-13. At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Claimant and Employer and admitted into evidence without objection thereby closing the record on October 23, 2006, as ALJX 7 and 8, respectively. *See* TR at 13-14.

STIPULATIONS

At the hearing, the parties entered into the following stipulations (TR at 14-17):

1. This claim involves an accidental injury to Claimant' left shoulder which occurred on January 11, 2002.

2. At the time of the alleged injury, an employer/employee relationship existed between Claimant and Employer.

3. Claimant suffered an injury on January 11, 2002 which arose out of and in the course of his employment with Employer.

4. The Longshore and Harbor Workers' Compensation Act applies to this claim.

5. The claim was timely noticed and filed.

6. Employer is not currently providing Claimant with compensation but is providing medical benefits.

7. There are no outstanding medical bills.

8. Claimant reached maximum medical improvement on February 13, 2003.

9. Claimant is currently working and has been since October 19, 2002.

10. Claimant is able to perform his pre-injury occupation.

11. Employer is not seeking section 8(f) Special Fund relief.[1]

Because I find that there is substantial evidence in the record to support the foregoing stipulations, I hereby accept them. *See generally* EX 1-84; CX 1-10.

ISSUES

1. What is Claimant's pre-injury average weekly wage?

2. What is the extent of Claimant's disability, if any?

See TR at 16; ALJX 7 at 1; ALJX 8 at 2.

FINDINGS OF FACT

Claimant, who was 46 years old at the time of trial, became a casual longshoreman in 1988. He received his "B" registration in 1995, and in 1999, he received his "A" registration with Local 8 of the International Longshore and Warehouse Union ("ILWU") in Portland,

[1] At the hearing, Employer withdrew its request for Special Fund relief under 33 U.S.C. § 908(f). TR at 7, 12, 176.

Oregon. TR at 35-37. While working for another longshore employer in 2000, Claimant sustained an injury to his right knee which required surgery.[2] TR at 37; EX 80 at 402-403.

The injury which is the subject of the present claim occurred on January 11, 2002, while Claimant was working on a separation gang hired for a bulk wheat ship. TR at 37. Claimant was pulling on a tarp when his feet slipped and he landed on the ship's steel deck with his left arm "hyperextended" behind him. TR at 38; CX 1. Claimant initially sought treatment from Dr. Nathan Levanger on January 16, 2002, and was taken off work. CX 9; EX 3 at 50. The impression was acute lumbar and cervical strain. *Id*.

On January 29, 2002, Dr. Lawrence Tremaine referred Claimant for physical therapy. CX 9 at 41; EX 3 at 52. Claimant complained to Dr. Tremaine on February 11, 2002 that he had developed left shoulder pain after a session of physical therapy. EX 6 at 56. Dr. Tremaine referred Claimant for orthopedic evaluation. *See* EX 7 at 57; EX 9 at 59; TR at 38-39.

Claimant underwent an MRI on March 11, 2002 which revealed a probable tear of the anterior labrum. CX 12 at 48; EX 10 at 61; EX 11 at 62. On March 26, 2002, Claimant was examined by orthopedic surgeon Dr. Terrence Sedgewick, who diagnosed left shoulder bicipital tendinitis. CX 15 at 51; EX 14; EX 16. On May 14, 2002, Dr. Sedgewick recommended arthroscopic surgery. CX 19; EX 16. Claimant underwent arthroscopic decompression and open biceps long head tenodesis on May 29, 2002. CX 21; EX 18. Claimant's left arm remained in a sling for about six weeks following surgery, during which time Dr. Sedgewick told him not to "use the arm at all." TR at 41-42.

On August 12, 2002, Dr. Sedgewick released Claimant to light duty work. EX 26. On September 13, 2002, Dr. Sedgewick recommended that Claimant continue light duty and follow up in one month, at which point he would be released to full duty. CX 24 at 81; EX 27, 28.

On October 14, 2002, Dr. Sedgewick released Claimant to "full duty/regular work" with no restrictions effective October 19, 2002. CX 24 at 82; EX 29. Claimant returned to work on October 20, 2002. *See* CX 4 at 11. Claimant testified that he had previously told Dr. Sedgewick that he needed a "full release" in order to return to work in any capacity. TR at 42-43.

Dr. Sedgewick saw Claimant again on November 14, 2002, and noted that he had "returned to full duty work as a longshoreman and is doing well." CX 25 at 83; EX 31. Physical examination of the left shoulder showed mild impingement pain with full flexion, some tenderness with resisted abduction and "some half-grade weakness." *Id.*

Dr. Sedgewick performed a closing examination of Claimant on February 13, 2003. CX 26; EX 32. He noted that Claimant "did well from the surgery" and had returned to full duty work. EX 32 at 85. Dr. Sedgewick reported that Claimant "has no complaints of pain in and around the shoulder during the day," and that "[h]e finds he cannot sleep on the shoulder at night but is tolerating his regular work full time hours." *Id.* Dr. Sedgewick opined that Claimant has "some residual deficit in range of motion, most notably with internal-external rotation." *Id.* Dr.

[2] Claimant testified at deposition that he also had a right knee injury and surgery prior to his becoming a longshoreman in 1988. EX 80 at 377-378.

Sedgewick recorded that Claimant's left shoulder "flexes to 154 degrees versus 158 degrees, left versus right. Abduction is 106 degrees versus 116 degrees and left extension is 64 degrees versus 78 degrees." EX 32 at 85. Dr. Sedgewick further recorded that "[s]trength with abduction is 5-/5 [sic]. Strength with external rotation is 5-/5 [sic]. Internal rotation is 5/5." *Id.* The doctor reported that "[s]trength has a half grade loss of abduction-external rotation." *Id.* In addition, Dr. Sedgewick noted "a positive impingement with forward flexion, non-tender at the AC joint. Supination is 5/5. Elbow has extension to 0 degrees and flexion to 135 degrees." *Id.* Dr. Sedgewick opined that Claimant's left shoulder condition was stationary and ratable, and recommended that Claimant continue with full-duty work. *Id.*

Claimant has not seen Dr. Sedgewick for his left shoulder injury since the closing examination in February 2003. TR at 59. Claimant testified that his ability to work was "pretty much the same" both before and after Dr. Sedgewick pronounced him medically stationary on February 13, 2003. TR at 91.

Claimant continued in full-duty work until August 18, 2003, when he suffered an injury to his right shoulder while working for another longshore employer. *See* EX 33, 37, 73; TR at 54, 58. On October 1, 2003, Claimant was examined at Employer's request by Dr. Robert Steele in connection with his right shoulder injury. EX 42. Dr. Steele noted that Claimant's left shoulder was "non-tender." EX 42 at 98. Dr. Steele reported that Claimant's right shoulder range of motion was almost symmetric to the left with a slight decrease as follows:

> Flexion on the right 162 degrees and on the left 178 degrees. Abduction on the right 178 degrees and on the left 180 degrees. External rotation at 90 degrees of abduction on the right 85 degrees, and left 88 degrees. Internal rotation at 90 degrees of abduction on the right 71 degrees and the left 76 degrees. Adduction on the right 68 degrees and on the left 72 degrees. Extension on the right 72 degrees and on the left 75 degrees.

EX 42 at 98. Dr. Steele also reported that all muscles of the shoulders had normal strength. *Id.*

On April 14, 2003, Dr. Sedgewick performed arthroscopic surgery on Claimant's right shoulder. *See* EX 73 at 151; TR at 51. As a result of his right shoulder injury, Claimant was off work from August 19, 2003 until November 1, 2004.[3] *See* EX 77 at 261; EX 80 at 403.

At Employer's request, Claimant underwent a second independent medical examination of his right shoulder on July 8, 2004. EX 60. Dr. Richard C. Arbeene recorded that "all motor functions in both upper extremities are graded 5/5 in strength." EX 60 at 121.

On October 5, 2004, Claimant was again released to "full duty/regular work with no restriction," effective October 11, 2004. *See* EX 66, 68. On November 18, 2004, Dr. Sedgewick reported that Claimant was "not having complaints of pain in the shoulder and he has been tolerating his work activities without limitations." EX 70, 71.

[3] Claimant received compensation for temporary total disability with respect to his right shoulder condition from August 19, 2003 through October 16, 2004. EX 69.

On March 25, 2005, Claimant underwent a third independent medical examination by Dr. Jon C. Vessely at Employer's request. EX 72. The stated "major purpose" of the exam was "to evaluate [Claimant's] right knee," but Dr. Vessely was also asked "about [Claimant's] left shoulder and whether . . . he is medically stationary." EX 72 at 135. In his report, Dr. Vessely noted that Claimant "was able to get back to full work activities" after his left shoulder injury. *Id*. at 141. Dr. Vessely recorded Claimant's complaints of occasional aching in his left shoulder if it is overstressed or pulled, and difficulty sleeping on the shoulder. *Id*. at 142. Dr. Vessely also noted that Claimant did not describe any limitations due to shoulder weakness. *Id*. As for his right knee, Claimant reported that his symptoms increase when he is "over active" on the knee, such as "when he does auto ships, which require a lot more going up and down inclines, including stairs and ramps." *Id.* Claimant also reported that he rides his horses four to five times a week, and sometimes notices pain in the knee when riding. *Id*.

Dr. Vessely's examination of Claimant's left shoulder revealed "no acute findings." EX 72 at 144. There was a slight prominence of the acromioclavicular (AC) joint without tenderness, and there was minimal anterior subacromial tenderness. *Id*. Dr. Vessely recorded that Claimant had "an excellent arc of motion in shoulder function," showing left shoulder range of motion as follows:

Abduction	150 degrees
Flexion	150 degrees
Extension	50 degrees
Adduction	40 degrees
Internal rotation	70 degrees
External rotation	80 degrees

Id. Impingement testing "produced minimal discomfort," and "[m]aximum discomfort was produced by forced contraction of the biceps tendon," although this was "normal in strength." *Id.* at 145. Rotator cuff function was intact. *Id.*

Dr. Vessely opined that Claimant had remained medically stationary with respect to his left shoulder injury since Dr. Sedgewick's closing exam on February 13, 2003. EX 72 at 148. Noting that Claimant had returned to regular longshore activities without limitations, Dr. Vessely did not feel any need to restrict Claimant's work activities regarding his left shoulder. *Id.* Dr. Vessley found no objective change in Claimant's left shoulder condition since Dr. Sedgewick's release in February 2003, and did not see any need for additional treatment. *Id.*

Claimant testified that before his left shoulder injury of January 11, 2002, he obtained jobs on the waterfront out of the union dispatch hall. TR at 44. He usually worked off "the ship board" because of the variety of jobs it offered and because the jobs paid more than some others. TR at 44-45. Claimant testified that in the 52 weeks preceding his left shoulder injury on January 11, 2002, he worked about four or five days a week. TR at 46, 48; EX 81 at 447.

Claimant explained that he tries to work as often as possible during the winters so that he can take time off during the summers to engage in his hobby of training and showing horses. TR at 46-48; EX 81 at 446. Claimant has been showing horses since 1979, attending shows mostly

on weekends. TR at 46. He rides the horses in barrel racing, pole vaulting, and pattern horse racing events. TR at 46-47. He usually owns no more than three horses at a time, and is their sole caretaker. TR at 47. Care involves feeding the horses in the mornings and at night, cleaning their stalls, and washing them. TR at 47.

At trial, Claimant testified that his left shoulder "joint itself aches a lot, and then, when I do too much lifting, I get a . . . sharper pain down at the elbow." TR at 54. He does not have shoulder pain on an everyday basis. TR at 54. Claimant testified that his left shoulder condition has not limited his activities with horses, except that he has learned "to do some things a little different," such as saddling the horses. TR at 54. Claimant previously testified in his deposition taken on April 5, 2006 that he has numbing around his surgical scar "all the time," and gets pain at the elbow when he overstresses the left arm by engaging in repetitive lifting.[4] EX 80 at 397-398. He said that Dr. Sedgewick advised him to "back off" whatever task he is performing when he has pain at the elbow. *Id.* Claimant estimated that he has overstressed his left arm and has had to "back off" from a task more than ten, but less than 50, times. *Id.*

Since returning to work on October 19, 2002 following left shoulder surgery, Claimant has continued obtaining jobs from the ship board. TR at 48. He testified that he "tried to do a little bit of everything," but some jobs bothered his shoulder. He explained that he "stayed away from hold jobs, and the lashing, after that." TR at 49. *See also* EX 80 at 396, 408 (Claimant's testimony that he is no longer able to take lashing or hold jobs). Claimant testified that his shoulder is bothered by "slab jobs," which involve placing heavy chain slings onto steel slabs for hauling out of a ship's hatch. TR at 50. Locking and unlocking cones from containers also irritates Claimant's elbow and left shoulder. TR at 67. Claimant testified at deposition that he has lost wage earning capacity as a consequence of being unable to take hold or lashing jobs. EX 80 at 408-409.

Claimant also testified that he does not appear for dispatch at the hiring hall on days when his shoulder is bothering him. TR at 50, 73. He explained that "there's times where just waking up in the morning, sleeping on [the left shoulder] wrong, it bugs me and stuff, and I just don't go in." TR at 52. On these occasions, Claimant takes a day or two off work. TR at 53-54. He estimates that he has missed 30 to 40 days of work due to left shoulder symptoms since returning to work in October 2002. TR at 66. Claimant believes he has passed up lashing and/or hold jobs possibly on more than ten occasions since November 2002. EX 80 at 396. Claimant also does not go to the dispatch hall when he feels he is too far down on the dispatch list, which he discovers by calling a telephone recording. TR at 50-51, 73. Claimant explained that he concludes from his position on the dispatch list that the only jobs likely to be available are jobs he feels physically incapable of performing, like lashing. TR at 51, 57.

Claimant prepared diaries of jobs taken on a daily basis for the years 1999 through 2006, although the diary for 2005 was destroyed in the washing machine. *See* EX 78; EX 80 at 394. Claimant keeps the diary in his car and fills in information "every day or so." EX 80 at 420; EX 81 at 454-455. He explained that the entry "lashing only" means that "I called the recording, and it sounded like that was all I'd be able to get, so I didn't go in." TR at 57. At his deposition, Claimant explained that the telephone recording gives him his position in the rotation for the

[4] The April 5, 2006 deposition of Claimant was subsequently continued on May 16, 2006. EX 81.

selection of jobs from the ship board. EX 81 at 448-449. He further explained that "if there are only 30 or 40 jobs and I'm 60 away, I know anything that's going to get to me is probably not going to be a very good job." EX 81 at 449. Thus, on days when Claimant felt that only lashing work was available, he did not appear for dispatch. Claimant could not give a definite number of days he has missed work because the only job available was lashing. EX 80 at 401. However, according to Claimant's diaries, this happened on eight occasions from October 2002 through February 2003. EX 78. Claimant affirmed that he recorded every time that he did not take a job because only lashing jobs were available, and he acknowledged that the last notation for "lashing only" appears in the diary for the date of February 10, 2003.[5] EX 80 at 422; TR at 78. Claimant testified that lashing are typically the last jobs left, but he admitted that he could not be certain based on his calling the recording that only lashing jobs were available on a given day. *Id.*

Claimant acknowledged that there are no "hard and fast" rules with respect to the days he works since his left shoulder injury on January 11, 2002. EX 81 at 458-459. He explained that, "if work is slow, I'll go do some stuff with the horses. [W]hen the work is there, I try and work, but I do try to work it out where I can work enough in the wintertime so I can take time off in the summer." *Id.* at 458. Claimant admits that if he did not take time off to show his horses during the summer, he could likely work as often in summer as he does in the winter if work was available. EX 81 at 447-448. He also admits that he could probably work five days a week through his local if he did not have horse-related activities and interests. *Id.* at 459, 468.

Roy Katzen, a vocational rehabilitation counselor retained by Employer, completed a vocational evaluation of Claimant and prepared a report dated June 22, 2006.[6] EX 82; TR at 118. Mr. Katzen also testified at trial. Mr. Katzen's evaluation was limited to the issues of: (1) Claimant's employment and work opportunities following his return to work on October 20, 2002 and extending until his next (right shoulder) injury on August 18, 2003; and (2) Claimant's present employability and work opportunities following his return to work on November 1, 2004 and extending through the present time. EX 82 at 470; TR at 119. Mr. Katzen reviewed some of Claimant's medical records, Claimant's deposition transcripts, work records and documents generated by the Pacific Maritime Association ("PMA"), and Claimant's personal work diaries. *See* EX 82 at 470-471; TR at 119-120. Mr. Katzen did not interview Claimant. *Id.*

Mr. Katzen concluded that Claimant's actual hours worked during two periods of time—October 20, 2002 through August 18, 2003, and November 1, 2004 and continuing—are not reflective of his work potential. EX 82 at 478; TR at 121-122. Mr. Katzen opined that full-time suitable work was available to Claimant during both time periods, and that any reduction in

[5] Claimant initially so testified at his deposition on April 5, 2006, at which time only the diaries for 2002, 2003 and part of 2004 were available for review. *See* EX 80 at 417. At that time, Employer requested Claimant's work diaries through 1999. *Id.* at 394. Employer, having since reviewed the complete set of diaries produced by Claimant, asked Claimant again at trial whether he knew of any "lashing only" notations made after February 2003. TR at 78. Claimant did not remember, but testified that he did not know of any such notations. *Id.*

[6] Mr. Katzen obtained a Bachelor of Arts in psychology from New York University in 1971, and a Master of Science in psychology from Portland State University in 1977. EX 82 at 480; EX 84. Mr. Katzen testified that he has been a vocational rehabilitation counselor for nearly 23 years and has been involved in longshore claims since 1989 or 1990. TR at 117-118.

hours worked is not a result of any medical restrictions but rather by Claimant's choosing to take large blocks of time off work. EX 82 at 478-479.

In addition, Mr. Katzen prepared a report dated June 29, 2006, entitled "Vocational Evaluation-Supplement." EX 83; TR at 118-119. The stated purpose of the supplemental report was "to provide a wage earning capacity estimate based on the conclusions of [Mr. Katzen's] report of 06/22/2006." EX 83 at 484. Mr. Katzen concluded that during the period from October 20, 2002 through August 18, 2003, Claimant worked 168 days and averaged $280.86 per day, for an average weekly wage of $1,404.30. EX 83 at 484. For the period from November 1, 2004 and continuing, Mr. Katzen concluded that Claimant "has earned in the range of $309.94 per day (last two months 2004—38 days worked) and $307.94 per day (full-year 2005—194 days worked). This is an [average weekly wage] of $1,545.35 (2004) and $1,539.70 (2005)." *Id*. Vacation pay was excluded from Mr. Katzen's calculations. *Id.*

CREDIBILITY ANALYSIS

1. Claimant

I find that Claimant's testimony was credible with respect to the mechanism of injury and the symptoms of his left shoulder condition which he experienced from the date of injury on January 11, 2002 through his return to work on October 20, 2002, as these are well-documented in the records of Dr. Sedgewick and other physicians and are consistent throughout the record. However, I find that the credibility of Claimant's testimony about the extent to which his left shoulder condition has caused a loss in wage-earning capacity is undermined because nothing in the record corroborates whether or how often Claimant's left shoulder condition causes him to miss work or decline work opportunities. Rather, the record shows that both before and after his left shoulder injury, Claimant has tended to frequently take time off work for horse-related activities, sickness and for other personal reasons not related to his injury. Moreover, Claimant admits that he could work five days a week through his union if he did not have his horse-related activities and interests. EX 81 at 459, 468. Furthermore, Claimant also admitted that he was not sure that based on his simply calling a telephone recording of listed jobs, in place of a personal presence at dispatch, that only lashing jobs were available on any given day. TR at 78; EX 80 at 422. I find Claimant's opinion of available jobs on any given day highly speculative because he chose to call a telephone recording rather than personally appear at the various dispatch boards seeking work.

2. Roy Katzen

I generally found Mr. Katzen to be a credible witness. His opinions were lucidly explained and consistent with the content of his written reports. While I acknowledge that Mr. Katzen has never met Claimant, I find that his testimony and opinions were based on a thorough review of medical and vocational information related to this case and I therefore credit his testimony and conclusions.

DISCUSSION

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent. As previously noted, the follow issues are in dispute: (1) Claimant's pre-injury average weekly wage; and (2) the extent of Claimant's disability. *See* TR at 16; ALJX 7 at 1; ALJX 8 at 2.

1. Average Weekly Wage

Under the Act, an employee's "average weekly wage" at the time of injury is a key component used to determine the amount of his disability benefits award, if any. Average weekly wage is computed by dividing the claimant's "average annual earnings" by 52 weeks. 33 U.S.C. § 910(d)(1). There are three methods for calculating a claimant's average annual earnings, set forth at 33 U.S.C. §§ 910(a)-(c). These methods are directed toward establishing earning power at the time of injury. *Orkney v. General Dynamics Corp*., 8 BRBS 543 (1978).

Under the method prescribed in section 10(a), the administrative law judge ("ALJ") first divides the actual earnings of the claimant during the 52 weeks preceding the injury by the number of days actually worked by the claimant in that period to obtain the claimant's "average daily wage." 33 U.S.C. § 910(a); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1055-56 (9th Cir. 1998). Next, the ALJ multiplies the average daily wage by either 260 if the claimant is a five-day worker or 300 if the claimant is a six-day worker, to get the claimant's "average annual earnings." 33 U.S.C. § 910(a). Section 10(b) uses a similar method, but computes the claimant's average daily wage based on the earnings of a typical worker engaged in similar employment, rather than the claimant's actual earnings. 33 U.S.C. § 910(b). Section 10(c) does not prescribe a fixed formula, but requires the ALJ to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 910(c); *Matulic*, 154 F.3d at 1056.

It is undisputed that during the one-year period preceding his injury, Claimant earned $63,644.08 and worked a total of 223 days. *See* EX 77; ALJX 7 at 3; ALJX 8 at 6. Claimant contends that he was a five-day worker whose average weekly wage should be calculated under section 10(a), by dividing his earnings of $63,644.08 during the 52 weeks preceding his injury by the 223 days he actually worked (excluding vacation and holidays), and multiplying that figure by 260 to arrive at average annual earnings of $74,203.86. Claimant's calculation yields an average weekly wage of $1,427.00.[7] TR at 17.

Employer urges, however, that Claimant's calculation should be rejected. Employer contends that section 10(c) applies rather than section 10(a), arguing that a calculation under section 10(a) would result in substantial overcompensation of Claimant and would otherwise be improper because Claimant has not established that he was a five-day worker. ALJX 8 at 7-8. Alternatively, Employer argues that if section 10(a) is found to apply, the number of days for

[7] Earnings of $63,644.08 divided by 223 days yields an average daily wage of $285.40. That figure is then multiplied by 260 to arrive at average annual earnings of $74,203.86, which is then divided by 52 weeks to arrive at an average weekly wage of $1,427.00. *See* 33 U.S.C. §§ 910(a), (d).

which Claimant was paid vacation and holiday pay must be included in the determination of the number of days Claimant worked in the year preceding injury. *Id.* at 9.

The decision in *Matulic v Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), controls the computation of the average weekly wage within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, where the present claim arises. In *Matulic*, the Ninth Circuit noted that the statutory language requires a presumption that section 10(a) applies in determining the injured worker's average weekly wage unless it would be unreasonable or unfair to do so. 154 F.3d at 1057. In determining whether application of section 10(a) is unfair or unreasonable, it must be determined whether Claimant worked "substantially the whole of the year" prior to injury. The Ninth Circuit concluded in *Matulic* that when a claimant works more than 75% of the workdays of the measuring year, the presumption that section 10(a) applies is not rebutted. 154 F.3d at 1058. Accordingly, the court held that section 10(a) could be fairly and reasonably applied in determining the average weekly wage of Mr. Matulic, a five-day worker who worked 213 of 260 (82%) possible work days in the measuring year. *Id*. at 1056. Emphasizing the "humanitarian purposes" of the Act, the Ninth Circuit held that section 10(c) "may not be invoked in cases where the only significant evidence that the application of [section 10(a)] would be unfair or unreasonable is that claimant worked more than 75% of the days in the year preceding his injury." *Id*. at 1058-1059.

Claimant asserts that he was a five-day worker, so that there are 260 total available work days in the measuring year. *See* 33 U.S.C. § 910(a). I find that Claimant actually worked 223 of 260 (86%) of available work days. Because he worked more than 75% of the available work days during the 52 weeks preceding his injury, *Matulic* requires the application of section 10(a) in this case. ALJX 7 at 1.

Employer argues that determination of Claimant's average annual earnings under section 10(a) results in "substantial overcompensation" to Claimant. ALJX 8 at 7. Employer points out that a computation under section 10(a) yields average annual earnings of $74,203.86, an amount which it asserts is 17% greater than Claimant's actual annual earnings for the 2001 calendar year or 30% greater than his earnings for the 1999 calendar year. *Id.* Such a calculation results in 14% greater earnings than the $63,644.08 which Claimant actually earned during the 52 weeks preceding his injury ($74,203.86 divided by $63,644.08).

The Ninth Circuit acknowledged in *Matulic* that there will be a degree of inaccuracy in the estimation of the worker's earning capacity in most cases. Nonetheless, the *Matulic* court explained that "the statute sets a high threshold and requires the application of [sections 10(a) or 10(b)] except in unusual circumstances." 154 F.3d at 1057. The court noted that "the statute contemplates that the number of days worked will ordinarily be less than 260 or 300 (as the case may be)," and went on to find that the application of section 10(a) to Matulic, "a claimant who worked 82% of the workdays in the year, is not only required but falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated" in adopting a fixed formula for section 10(a). *Id.* at 1058. It was also noted that Matulic earned $43,370.81 in the 52 weeks preceding injury, yet his annual earnings would be calculated at $52,941.20 under section 10(a). The fact that this represents a 19% increase over Matulic's actual earnings did not deter the Ninth Circuit from applying section 10(a).

Consistent with the principles outlined in *Matulic*, I reject Employer's argument that application of section 10(a) unfairly overestimates Claimant's annual earnings. While section 10(a) yields average annual earnings which are 14% greater[8] than Claimant's actual earnings during the 52 weeks preceding his injury, this degree of overcompensation is less than that approved by the Ninth Circuit in *Matulic*. Moreover, Claimant here worked 223 days, which exceeds the 213 days worked by Matulic. Accordingly, I find that the result in this case is "within the realm of theoretical or actual 'overcompensation'" contemplated by Congress in enacting section 10(a), and is thus insufficient by itself to overcome the presumption that section 10(a) applies in this case.

Although Employer does not dispute that Claimant worked 223 days in the 52 weeks preceding his injury, it next argues that application section 10(a) is improper because Claimant failed to establish that he was a five-day-a-week worker. ALJX 8 at 8. Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. *See* 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp*., 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then section 10(a) will apply. *See Duncan v. Washington Metro. Area Transit and Auth*., 24 BRBS 133, 136 (1990). However, when it is unclear whether an employee is a five day or six day worker, or there is insufficient evidence to determine an average daily wage, section 10(a) cannot be fairly applied. *Sproull v. Stevedoring Serv. of Am*., 25 BRBS 100, 104 (1991) (section 10(a) could not be used because it was not clear whether claimant was a five or six day worker); *Lobus v. I.T.O. Corp of Baltimore*, 24 BRBS 137, 140 (1990).

In *Eleazer v. General Dynamics Corp*., 7 BRBS 75 (1977), the claimant often worked on Saturdays but not often enough to be classified as a six-day, rather than five-day, worker. Accordingly, the Benefits Review Board concluded that the claimant's average weekly wage was properly determined pursuant to Section 10(c), since Section 10(c) takes into account this irregular pattern of Saturday overtime work. *Eleazer*, 7 BRBS 75 at 79. In this case, however, neither Claimant nor Employer asserts that Claimant is a six-day worker. Claimant testified that he has never worked six days a week. TR at 84. This case is thus distinguishable from cases where it was unclear whether the claimant was a five or six day worker. *See Eleazer*, 7 BRBS 75; *Sproull v. Stevedoring Serv. of Am*., 25 BRBS 100, 104 (1991); *Warren v. Lockheed Shipbuilding*, 39 BRBS 444 (ALJ July 18, 2005).

Claimant testified that he worked an average of four or five days a week (TR at 46, 48), and tried to work as much as possible during the winter so he could take time off in summer to spend with his horses. TR at 48. The record reflects that Claimant worked approximately 1,898 hours over 223 days, and worked during all 52 weeks of the measuring year. *See* CX 3 at 10. Although Claimant did not work the traditional 40-hour work week and did not work the same number of days each week, Employer introduced no evidence, and I find none exists in the record, to show that Claimant's employment was seasonal or intermittent, or that there were any fixed, determinable periods of inactivity during Claimant's work year. *See Price v. Stevedoring Services of America*, 366 F.3d 1045, 38 BRBS 25 (9th Cir. 2004) (section 10(a) cannot

[8] 1 - ($63,644.08 / $74,203.86) = 1 - .8576923 = .1423077

reasonably and fairly be applied when there are fixed, determinable periods of inactivity during the year because the nature of the employment is such that it cannot afford a full year of work as sections 10(a) presumes). Even adjusting Claimant's work history to reflect a typical five day, 40 hour work week, Claimant worked a sufficient number of hours to have worked over 47 five-day work weeks. *See Irvin v. Crowley American Transport*, 35 BRBS 422 (ALJ March 16, 2001) (dividing the total number of hours worked in the measuring year by 40 hours in case where the claimant worked an average of 32 hours, four days a week). *See also Price*, 366 F.3d 1045 (noting that, although the claimant's work through the union hiring hall fluctuates in the sense that he does not always "work the same number of days every week," this does not prevent section 10(a) from being reasonably and fairly applied).

In light of the foregoing, I find that the nature of Claimant's employment was regular, continuous and stable throughout substantially the entire year, and that Claimant's work history qualifies him as a five-day worker for purposes of the average weekly wage computation under section 10(a). I further find that there is sufficient evidence in the record, in the form of payroll records which show the number of days actually worked and the wages Claimant received during the year preceding injury, from which Claimant's average daily wage can be calculated. Accordingly, section 10(a) applies to this case.

Employer's final argument is that if Claimant's average weekly wage is to be determined pursuant to section 10(a), the number of days for which he was paid vacation and holiday pay must be included in determining the number of days he worked prior to injury. ALJX 8 at 9. Employer submits that during the base year, Claimant received 120 hours of vacation pay, for which he qualified by working 1300 hours during the preceding year. *Id.* (citing EX 77 at 255; TR at 65-65, 102). In addition, Claimant was entitled to fourteen holidays and worked on four of them. ALJX 8 at 9. Employer asserts that the ten holidays on which Claimant did not work must be included as days worked. *Id.* Claimant disputes that holidays and vacation should be included in determining the number of days he actually worked prior to his injury. ALJX 7 at 2.

Claimant's payroll records indicate that in the 52 weeks preceding his injury, he worked 223 days and was paid for fourteen holidays. CX 3 at 3-10. He was also paid for 120 hours of vacation time. CX 3 at 10. Claimant did not have to take vacation days to receive vacation pay. TR at 64-65. Although Employer avers, and evidence in the record supports, that Claimant used all of his previously-earned vacation time, I find that the 120 hours Claimant received in vacation pay do not count toward days actually worked. *See Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616 (5th Cir. 2000) (charging the administrative law judge with making fact-finding concerning whether a particular instance of vacation compensation counts as a 'day worked.'). This is because the evidence shows that Claimant would have received 120 hours of vacation pay even if he had worked every day of the measuring year. *See* TR at 65. In this sense, Claimant's vacation days does not replace any actual work days.

However, I agree that holidays for which a claimant is paid but does not work should count as "work days," since Claimant received wages for an actual day off work. Consequently, in the 52 weeks preceding injury, Claimant worked a total of 233 days (223 actual days worked, which includes four holidays on which Claimant worked, plus ten paid holidays on which he did not work), and earned $63,644.08. This results in an average daily wage of $273.15, which is

then multiplied by 260 pursuant to section 10(a) since Claimant was a five-day worker, to yield average annual earnings of $71,019.14. Accordingly, I find that Claimant's average weekly wage is $1,365.75.[9]

2. The Extent of Claimant's Disability

a. Compensable Injury

To establish a claim for benefits under the Act, a claimant must establish the existence of a "disability," defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). "Injury" is defined in part as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Employer concedes that Claimant sustained a left shoulder injury on January 11, 2002, in the course and scope of his employment. TR at 15. This is supported by medical opinions and treatment notes in the record. *See, e.g.,* CX 9; CX 12 at 48; CX 15 at 51. Accordingly, I find that Claimant's injury is compensable under the Act.

b. Temporary Total Disability

The record reflects that Claimant received compensation from Employer for temporary total disability from January 12, 2002 through October 18, 2002, given that Dr. Sedgewick released Claimant to work as of October 19, 2002. *See* CX 24 at 82; EX 29. Compensation was paid at the rate of $801.31, based on an average weekly wage of $1201.96. EX 30. The period of temporary total disability is not in dispute, but Claimant asserts that he is entitled to additional temporary total disability compensation based on a higher average weekly wage than was used by Employer in calculating his benefits. I agree, and find that Claimant is entitled to compensation for temporary total disability based on an average weekly wage of $1,365.75, consistent with the preceding analysis of the average weekly wage issue. *See* 33 U.S.C. § 908(b).

c. Temporary Partial and Permanent Partial Disability

For Claimant to receive a disability award, an economic loss coupled with a work-related physical impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). While the parties agree that Claimant suffered a work-related injury, the burden of proving the extent of his disability rests with Claimant. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985). The parties also agree that Claimant is currently working and has been since he was released to work by Dr. Sedgewick on October 19, 2002. TR at 15-16. As a result, Claimant's disability, if any, is a partial one. The question that remains is the extent of Claimant's post-injury wage-earning capacity.

Claimant contends that he is entitled to compensation for temporary partial disability from October 19, 2002, when he was released to work, through February 13, 2003, the date on which he reached maximum medical improvement. *See* TR at 14-15; ALJX 7 at 7. He asserts that his earnings during this period fairly and reasonably represent his wage-earning capacity,

[9] $71,019.14 divided by 52 weeks = $1,365.75. *See* 33 U.S.C. § 910(d).

with the exception of the payroll week of January 17, 2003, when he was ill. ALJX 7 at 7. He adds that there were "no other weeks or days when he was unavailable for work, except that there were some days he did not go the hiring hall because his shoulder bothered him or he did not feel that his chances of obtaining a suitable job were very good." *Id*. (citing CX 5 at 11-14).

Claimant also contends that he is entitled to compensation for permanent partial disability beginning on February 14, 2003, and submits that the amount of such compensation may be calculated in one of two ways. ALJX 7 at 9. The first is by determining his residual earning capacity from February 14, 2003 through August 18, 2003, when he suffered an unrelated right shoulder injury that took him off work until November 1, 2004. Secondly, Claimant proposes that his loss of wage earning capacity may be calculated based on the periods of February 14, 2003 through August 18, 2003, and from November 1, 2004 through March 23, 2006. ALJX 7 at 10, 11, 15. Claimant contends that he has an average residual wage-earning capacity of $1,222.49 per week based on his actual earnings during these two periods. *Id.* at 11, 15.

Employer asserts that there is no need to consider separate periods of temporary partial and permanent partial disabilities. ALJX 8 at 16 n.11. Employer points out that Claimant testified that his ability to work was "pretty much the same" both before and after he was pronounced permanent and stationary by Dr. Sedgewick on February 13, 2003. ALJX 8 at 91; TR at 91. Claimant also agreed that he worked "regularly" from his return to work on October 20, 2002 until he injured his right shoulder in August 2003. TR at 91.

I agree with Employer that it is unnecessary to separate the wage-earning capacity inquiry into distinct periods of temporary partial and permanent partial disabilities. Section 8(h) of the Act provides that "[t]he wage-earning capacity of an injured employee *in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e)* of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity . . . ." 33 U.S.C. § 908(h) (emphasis added). The section 8(h) wage earning capacity inquiry plainly applies both to section 8(c)(21), which governs Claimant's claim for permanent partial disability benefits, and section 8(e), which governs his temporary partial disability claim. [10] Claimant does not argue that his post-injury wage-earning capacity changed as a result of his doctor's pronouncement on February 13, 2003 that the left shoulder condition was permanent and stationary. To the contrary, Claimant testified that his ability to work was the same before and after he reached maximum medical improvement. TR at 91. Accordingly, I consider the issue of Claimant's post-injury wage-earning capacity beginning with his return to work on October 20, 2002 and continuing thereafter.

d. Post-Injury Wage-Earning Capacity

The parties disagree about whether Claimant has lost wage-earning capacity as a result of his left shoulder injury. Wage earning capacity refers to "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989). If Claimant has a physical impairment but has suffered no loss in his wage-earning capacity, he has suffered no financial loss and therefore is not disabled. *Del Vecchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984).

[10] *See* 33 U.S.C. §§ 908(c)(21), (e).

Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition. *Id*. In determining whether a claimant's actual post-injury earnings fairly and reasonably represent his wage-earning capacity, consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). Regarding physical condition, consideration is given to whether the employee must seek light work, or turns down heavy work and requires more time off, *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850, 857 (1980), and whether the employee loses work for physicians' visits necessitated by the injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 330, 9 BRBS 453 (4th Cir. 1978).

The record reflects that from October 20, 2002, when Claimant returned to work following the subject left shoulder injury, until August 18, 2003, when he sustained a right shoulder injury, Claimant's actual earnings were $47,185.30 (excluding vacation pay). *See* CX 4 at 11-12; CX 5 at 14-17. This includes twelve paid holidays (six of which he worked). Claimant worked 170 days during this 43-week period.[11] *See* EX 77 at 255-260. Thereafter, Claimant was off work due to his unrelated right shoulder injury from August 19, 2003 through October 30, 2004. He returned to work on November 1, 2004, and earned $89,528.58 (excluding vacation pay) from November 1, 2004 through March 26, 2006, a period of just under 73 weeks. *See* EX 77 at 261-266d.

Both Claimant and Employer raise the issue of which time period should be the focus of the inquiry into Claimant's wage-earning capacity following the left shoulder injury of January 11, 2002. Employer disputes that Claimant has a loss of earning capacity after returning to work from the unrelated right shoulder injury in November 2004, but asserts that any such loss which may be found to exist is "at least probably due to the right shoulder injury." ALJX 8 at 17 n.13. Accordingly, Employer contends that the best measure of earning capacity is the period prior to the August 18, 2003 right shoulder injury. *Id.* Claimant agrees that it would be reasonable to exclude the period after August 18, 2003 in measuring his post-injury wage-earning capacity.[12] ALJX 7 at 9.

[11] Employer asserts that Claimant worked 168 days during this period. However, after repeated counting, I find 170 entries in the payroll records showing actual jobs performed by Claimant. This does not include holidays on which Claimant did not work, days where he received guarantee pay, or the "PMA Training" reflected on January 23, 2007. The figure 170 days does include one entry on January 24, 2003, where the occupational code description is "Basic." *See* EX 77 at 257.

[12] As previously noted, however, Claimant would have me look at his wage-earning capacity for the period of October 20, 2002 through February 13, 2003 as a distinct inquiry from his earning capacity from February 14, 2003

I agree with the parties that it is reasonable to determine the extent of Claimant's post-injury wage-earning capacity due to the left shoulder injury by reference to the period of October 20, 2002 through August 18, 2003. This excludes any time after Claimant sustained his right shoulder injury. Both Claimant and Employer note that Claimant was off work for nearly fourteen months following his right shoulder injury and surgery, and that his signed application for settlement of his claim for compensation based on that injury acknowledged Claimant's contention that he was no longer capable of taking all jobs available to longshore workers. *See* ALJX 7 at 10 (citing CX 8 at 34-35, 38); ALJX 8 at 17 n. 13 (citing EX 74 at 154). The period of October 20, 2002 through August 18, 2003 also includes both winter months when Claimant testified that he tries to work as often as possible and summer months when he was busier with his hobby of showing horses. Accordingly, I find that the 43-week period between Claimant's return to work on October 20, 2002 and his unrelated injury on August 18, 2003 provides a suitable time frame for measuring Claimant's post-injury wage-earning capacity.

As previously noted, Claimant's actual earnings for 170 days during the 43-week period between October 20, 2002 and August 18, 2003 were $47,185.30, vacation pay excluded.[13] This results in a post-injury average weekly wage of $1,097.33 ($47,185.30 / 43 weeks). Put another way, Claimant's earnings of $47,185.30 over 170 days of work results in a post-injury average daily wage of $277.56 ($47,185.30 / 170 days).

Employer contends that Claimant's hours and earnings between October 20, 2002 and August 18, 2003 are not representative of his true earning capacity. ALJX 8 at 16. As the party contending that Claimant's actual wages are not representative of his wage-earning capacity, Employer has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983). In this regard, Employer argues that: (1) Claimant had a full recovery from his left shoulder injury and was released to work without medical restrictions; (2) Claimant's contentions that he has lost earning capacity because he cannot perform lashing and select hold jobs are not supported by the record; and (3) Employer's vocational expert, Roy Katzen, established that work was available to Claimant on a full-time basis during the relevant period had he chosen to accept it. ALJX 8 at 17.

With respect to Claimant's physical condition, the record reflects that Dr. Sedgewick released Claimant to "full duty/regular work" with no restrictions on October 19, 2002. CX 24 at 82. Claimant asserts that he had previously told Dr. Sedgewick that he needed a "full release" in

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through August 18, 2003. For the reasons explained in Section 2(c) of this Decision and Order, however, I decline to do so.

[13] Claimant also received a lump sum payment of $3,321.60 in February 2003. *See* CX 4 at 13. It has been held that receipt of vacation pay earned due to pre-injury work does not reflect post-injury "wage-earning capacity" under section 8(h) of the Act. *See Seaco v. Richardson*, 136 F.3d 1290 , 1291 n.3, 1293 (11th Cir. 1998) (per curiam) (holding that the employee's receipt of container royalty and holiday/vacation payments does not represent post-injury wage-earning capacity under section 8(h)); *Eagle Marine Services v. Director, Office of Workers Compensation Programs*, 115 F.3d 735, 737 (9th Cir. 1997) (employee's receipt of holiday pay did not reflect post-injury "wage-earning capacity" under section 8(h) because the employee's entitlement to the holiday pay was based upon his working a certain number of hours in the previous year). Claimant testified that he earns vacation pay by working a certain number of hours in the preceding year. TR at 65. Accordingly, Claimant's vacation pay is excluded from the determination of his wage-earning capacity.

order to return to work (TR at 42-43), and thus avers this is the reason he has no work restrictions. ALJX 7 at 5. Claimant maintains that he does, in fact, have "some significant limitations of range of motion and a loss of strength" in his left shoulder. *Id.* (citing CX 26 at 84-85). Claimant also points out that he has modified his work habits since he returned to work following his left shoulder injury by taking time off work to rest his shoulder on days when it bothers him; staying home when he feels he will not have a good choice of jobs due to his position in the dispatch rotation; and, avoiding jobs which aggravate his shoulder. ALJX 7 at 7.

I find based on the medical evidence in the record that Claimant is physically capable of performing the same jobs and working the same number of hours as he did before his injury on January 11, 2002. As noted above, the record reflects that Dr. Sedgewick released Claimant to "full duty/regular work" with no restrictions on October 19, 2002. CX 24 at 82. Although Claimant avers this was due to his request for a full release, the record supports a finding that Claimant recovered from his left shoulder injury and surgery and does not have any physical limitations due to that injury which affect his ability to perform his pre-injury work.

When Dr. Sedgewick saw Claimant on November 14, 2002, he noted that Claimant had "returned to full duty work as a longshoreman and is doing well." At that time, physical examination showed mild impingement pain with full flexion, some tenderness with resisted abduction and "some half-grade weakness." CX 25 at 83; EX 31. Subsequently, Dr. Sedgewick performed a closing examination of Claimant on February 13, 2003, and reported that Claimant "has no complaints of pain in and around the shoulder during the day," and that "[h]e finds he cannot sleep on the shoulder at night but is tolerating his regular work full time hours." EX 32 at 85. Dr. Sedgewick opined that Claimant has "some residual deficit in range of motion, most notably with internal-external rotation" but nonetheless felt Claimant should continue with full-duty work. *Id.*

Although Claimant did not receive any medical treatment for the left shoulder after February 2003, his left shoulder was subsequently examined on three occasions by three different physicians retained by Employer. Drs. Steele and Arbeene examined Claimant in connection with his right shoulder injury, but both documented improvements in Claimant's left shoulder range of motion and strength. *See* EX 42, 60. Dr. Steele recorded on October 1, 2003 that Claimant's internal rotation had improved to 76 degrees from 44 degrees as documented by Dr. Sedgwick in February 2003, and external rotation had improved to 88 degrees from 55 degrees. EX 42 at 98. Dr. Steele also reported that all muscles of the shoulders (both right and left) had normal strength. *Id.* Dr. Arbeene reported on July 8, 2004 that "all motor functions in both upper extremities are graded 5/5 in strength." EX 60 at 121.

In the third medical evaluation instituted by Employer, Dr. Vessley was specifically asked about Claimant's left shoulder condition. Dr. Vessely recorded on March 25, 2005 that Claimant had an "excellent arc of motion in shoulder function," including left shoulder internal rotation of 70 degrees and external rotation of 80 degrees. EX 72 at 44. Noting that Claimant had returned to regular longshore activities without limitations, Dr. Vessely did not feel any need to restrict Claimant's work activities regarding his left shoulder. *Id.*

Claimant testified that he has not sought medical attention from Dr. Sedgewick for his left shoulder since the closing examination in February 2003. TR at 59. As a consequence, the record contains no opinions by Dr. Sedgewick more recent than those expressed in his closing examination report. Based on the three medical evaluations referenced above, I find that any range of motion deficits and/or loss of strength present in Claimant's left shoulder at the time of Dr. Sedgewick's closing examination have pretty much resolved. There is no other medical evidence that Claimant suffers any other form of impairment or is restricted from any work activities due to his left shoulder injury.

Claimant testified that he does not have left shoulder pain on an everyday basis, but the "joint itself aches a lot, and then, when I do too much lifting, I get a . . . sharper pain down at the elbow." TR at 54; EX 80 at 397-398. He further testified that Dr. Sedgewick advised him to "back off" whatever task he is performing when he gets pain at the elbow. *Id.* Claimant testified that after he returned to work on October 19, 2002, some jobs bothered his shoulder and he "stayed away from hold jobs, and the lashing, after that." TR at 49. *See also* EX 80 at 396, 408. Claimant specifically alleges he is no longer capable of performing lashing and certain hold jobs, and that he missed several work opportunities between October 20, 2002 and February 13, 2003 because the only jobs available were lashing jobs. Claimant testified at deposition that he has lost wage earning capacity as a consequence. EX 80 at 408-409.

I can find no evidence in the record before me to support Claimant's assertion that any alleged loss in earnings is related to his injury. As explained above, no medical evidence supports Claimant's contention that he is no longer physically capable of certain longshore activities. However, because I found Claimant to be a generally credible witness, I credit his testimony that lashing and hold jobs bother his left shoulder. Nonetheless, I am not persuaded by Claimant's testimony that he has lost wage earning capacity as a result of his being unable or unwilling to take hold and/or lashing jobs.

As an initial matter, Claimant's own testimony and his payroll records establish that at best, he had worked lashing positions infrequently even prior to his left shoulder injury. Claimant agreed that he worked only about 50 hours as a lasher since 1999. *See* EX 80 at 393. He took some lashing work before 1999, when he was a casual and a B-registered worker. Id. at 394. Since May 2000, Claimant performed a lashing job either one time or not at all. See EX 77 at 250; ALJX 8 at 12-13 n.7.

In seeking to establish a loss of the ability to earn wages through hold or lashing jobs, Claimant presents his work diaries. Claimant documented his alleged loss of work opportunity by making notations in his work diaries when he believed only lashing jobs were available. According to Claimant's diaries, this happened on eight occasions from October 2002 through February 2003.[14] *See* EX 78. Claimant affirmed that he recorded every time that he did not take

[14] According to Claimant's diaries, he could not get any jobs other than lashing on October 30, 2002, November 7, 2002, December 4, 2002, December 18, 2002, January 7, 2003, January 20, 2003, February 3, 2003, or February 10, 2003. *See* EX 78 at 338-341, 344.

a job because only lashing jobs were available, and he acknowledged that the last notation for "lashing only" appears in the diary for the date of February 10, 2003.[15] EX 80 at 422; TR at 78.

I do not find Claimant's work diaries to be persuasive evidence of wage loss. Claimant admits that although he believes his diaries are "pretty accurate," there "could be mistakes in there." TR at 59-60. At trial, I noted several occasions during Claimant's testimony where he was unsure about the accuracy of particular diary entries on some days or the reason for an absence of entries on other days. *See e.g.* TR at 56, 58, 60, 61, 71, 72, 73, 74, 75, 76, 81, 86. *See also* EX 80 at 396, 417; EX 81 at 439, 442, 445, 448, 453-54. Claimant explained that the entry "lashing only" means that "I called the recording, and it sounded like that was all I'd be able to get, so I didn't go in." TR at 57. Claimant testified that lashing jobs are typically the last jobs left, but he admitted he could not be certain by calling the recording that only lashing jobs were available. *Id.* Claimant could not recall whether he called the dispatch recording or went to the hiring hall on the days where "lashing only" is reflected in his diary. *See, e.g.*, TR at 71, 72, 74. Given these circumstances, I find that Claimant's diary entries are not particularly reliable and I do not give this evidence much weight. Moreover, I decline to give any weight to Claimant's testimony that he concluded based on his calls to the dispatch recording that only lashing jobs were available on certain days, since he admits that such conclusions were based on assumption and speculation.

I find that Claimant's contention that he has lost wage earning capacity as a result of his being unable or unwilling to take lashing jobs is not supported by evidence in the record. I further find that there is no evidence establishing that Claimant has lost wage-earning capacity due to his being unable or unwilling to take hold jobs, or any other specific job assignment. Claimant's diaries only reflect days on which he assumed only lashing positions were available, and contain no similar notations with respect to hold jobs or other jobs he claims bother his shoulder. Claimant could not estimate how many days he missed work because the only jobs available to him were hold jobs. *See* EX 80 at 400-401.

Having reviewed some of Claimant's medical records, deposition transcripts, work and payroll records and other documents generated by the PMA, Mr. Katzen concluded in his June 22, 2006 report that Claimant's actual hours worked from October 20, 2002 through August 18, 2003 are not reflective of his work potential. EX 82 at 478; TR at 121-122. Mr. Katzen noted that during the 43 week period between October 20, 2002 and August 18, 2003, Claimant logged 1398.25 hours and actually worked during 39 of the 43 weeks, having taken four weeks off for various reasons unrelated to any injury. EX 82 at 476. Mr. Katzen calculated that Claimant worked an average of 35.85 hours per week during the 39 weeks he worked, and compared this with Claimant's pre-injury work hours for the year preceding his left shoulder injury (January 12, 2001 through January 11, 2002), during which he averaged 35.54 hours per week. *Id.* Mr. Katzen noted that Claimant's post-injury hours are slightly higher than his pre-injury hours. *Id.*

[15] Claimant initially so testified at his deposition on April 5, 2006, at which time only the diaries for 2002, 2003 and part of 2004 were available for review. See EX 80 at 417. At that time, Employer requested Claimant's work diaries back through 1999. *Id.* at 394. Subsequently, Employer, having reviewed the complete set of diaries produced by Claimant, again asked Claimant whether he knew of any notations for "lashing only" made after February 2003. TR at 78. Claimant did not remember, but testified that he did not know of any such notations. *Id.*

Mr. Katzen's report also reflects that he "closely examined work opportunities on those days when [Claimant] chose not to work." EX 82 at 476. He reviewed PMA daily dispatch records for jobs assigned to casual and B-registered workers, and concluded that the jobs listed in the records are assignments that would have been available to an A-registered worker such as Claimant. *Id*. Mr. Katzen also reviewed Claimant's daily work diaries. *Id*. Finally, Mr. Katzen reviewed PMA records which showed Claimant's availability (or unavailability) for jobs on a daily basis. *Id*. The availability records reflected 104 days between October 20, 2002 and August 18, 2003 where Claimant was "unavailable," including eight days that Claimant indicated in his diary that he was unable to work because only lashing jobs were available. *Id.* at 476-477.

As a result of comparing the PMA daily dispatch records with Claimant's work diaries, Mr. Katzen credibly concluded that of the 104 days on which the PMA records reflect that Claimant was unavailable, there were jobs available which were suitable for Claimant on 102 of those days. EX 82 at 477. Mr. Katzen emphasized that there was suitable work available on seven of the eight days on which Claimant noted in his diaries that there were only lashing jobs available to A-registered longshore workers.[16] *Id.* Based on this analysis, Mr. Katzen concluded that there was "ample opportunity" for Claimant to work full-time (at least 40 hours per week) after his return to work on October 20, 2002. *Id.* This was true both for the time Claimant actually worked and the four weeks he took off work. Id. at 479. Accordingly, Mr. Katzen opined that full-time suitable work was available to Claimant during this period, and that any reduction in hours worked is not a result of any medical restrictions but rather by his choosing to take large blocks of time off work. EX 82 at 478-479.

Claimant argues that Mr. Katzen's findings that B-registered workers worked on days when Claimant did not does not prove that Claimant could have worked those days. ALJX 7 at 8. Claimant testified that at the start of the week, B workers can obtain jobs for one week at a time. Those jobs will not return to the hiring hall for the rest of the week, and A workers cannot replace the B workers during that time. *Id.* at 8, 12 (citing TR at 51-52). Thus, Claimant asserts that if he does not work on any day of the week besides Monday and a B worker does, it does not necessarily mean that the B worker's job would have been available to Claimant. *Id.* at 8. However, Claimant's own diary reflects "lashing only" at the start of three work weeks, including January 20, 2003 (Monday), February 3, 2003 (Monday), and February 10, 2003 (Monday). EX 78 at 344. On cross-examination, Claimant admitted surprise at Employer's evidence that B workers and casuals took 50 non-lashing jobs on February 3rd and 28 jobs on February 10, 2003. TR at 77-78. This only underscores my concerns about the accuracy of Claimant's work diaries and accordingly, I do not find Claimant's argument very persuasive.

Claimant further argues that if he took a day or days off to rest his shoulder, this represents a loss in wage earning capacity even if B workers and casuals worked on those days. ALJX 7 at 8. Claimant points out that Mr. Katzen "ignored" this in performing his analysis, and also did not consider that Claimant "might have to back off work due to overstressing his left arm or shoulder." *Id.* However, there is no evidence in the record which corroborates

[16] The job assignments examined by Mr. Katzen included clerk, holdman, auto-driver, dockman, frontman/slingman, gang boss, lift truck driver, master console operator, switch/second console/barge, and tractor-semi-dock (UTR) truck driver. EX 82 at 477. Mr. Katzen noted that these were jobs that Claimant has performed in the past and has continued to perform since the subject injury. *Id*.

Claimant's testimony that he stayed home from work on various days because his shoulder was bothering him or for some other reason. As previously noted, Claimant's diaries only reflect days on which he assumed only lashing positions were available.

Claimant acknowledged that there are no "hard and fast" rules with respect to the days he works since his left shoulder injury on January 11, 2002. EX 81 at 458-459. He explained that, "if work is slow, I'll go do some stuff with the horses. [W]hen the work is there, I try and work, but I do try to work it out where I can work enough in the wintertime so I can take time off in the summer." *Id.* at 458. This is consistent with Claimant's work pattern before his left shoulder injury. Claimant admits that if he did not take time off to show his horses during the summer, he could likely work as often in the summer as he does in the winter if work was available. EX 81 at 447-448. He also admits that he could probably work five days a week through his local if he did not have horse-related activities and interests. *Id.* at 459, 468.

In light of the foregoing, I credit Mr. Katzen's analysis and conclusion that there was "ample opportunity" for Claimant to work full-time (at least 40 hours per week) from the time he returned to work on October 20, 2002 through his subsequent injury on August 18, 2003. I find that Claimant is physically capable of working, and that suitable jobs have been shown to be available to him, on a full-time, 40-hours per week basis during the relevant time period. Claimant admits that he could probably work five days a week through his local if he did not have horse-related activities and interests. *Id.* at 459, 468. I further find that any work he has missed has not been shown to be related to his on-the-job left shoulder injury. Rather, I find that Claimant decided of his own accord to take time off to show his horses, sickness, or other personal reasons not related to the subject injury. Accordingly, I am unable to hold Employer responsible for Claimant's personal choices and unique work patterns.

As previously noted, Claimant's actual earnings for 170 days during the 43-week period between October 20, 2002 and August 18, 2003 were $47,185.30, vacation pay excluded.[17] This results in a post-injury average weekly wage of $1,097.33. However, having considered several relevant factors—including Claimant's physical condition, industrial history, and availability of jobs which he can perform—I find that this does not fairly and reasonably represent Claimant's wage-earning capacity. Rather, I find that Claimant has a post-injury wage-earning capacity of $1,387.80, calculated by multiplying his average daily wage of $277.56[18] by a five-day work week.

e. Comparison of Pre- and Post-Injury Wages

In order to compare post-injury wage-earning capacity and pre-injury average weekly wage on an equal basis, the wages earned in a post-injury job must be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See generally Sproull v. Director, OWCP,* 86 F.3d 895, 30 BRBS 49 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Richardson v. General*

[17] *See* n.13

[18] $47,185.30 / 170 days = $277.56 per day

Dynamics Corp., 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The Benefits Review Board has held that if the record is devoid of evidence regarding the wages paid by the post-injury job at the time of injury, the administrative law judge should use the percentage increase in the National Average Weekly Wage to adjust current wages for inflationary effects. *Richardson,* 23 BRBS 237. However, when evidence does establish the actual wage a claimant's post-injury job paid at the time of injury, the adjustment for inflation in determining the effect of the injury on wage-earning capacity is made by comparing the average weekly wage with the post-injury job's actual wage at the time of injury. *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984).

Claimant submitted evidence of the increases in the base wage for longshore workers since Claimant's injury. *See* CX 6 at 28. Those records show that the hourly base wage rate increased from $27.68 at the time of Claimant's injury in January 2002 to $28.18 in June 2003. *Id.* The rate of $28.18 an hour remained in effect through August 18, 2003, when Claimant injured his other shoulder. Based on these figures, I find that Claimant's adjusted post-injury wage-earning capacity is $1,363.18.[19] That sum, subtracted from the pre-injury average weekly wage of $1,365.75, yields a wage loss of $2.57 per week. Claimant's compensation rate will be calculated accordingly. *See* 33 U.S.C. § 908(c)(21).

4. Employer's Obligation for Outstanding Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). *See also Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 165 (5th Cir. 1993). In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978).

In this case, the parties stipulated that Claimant suffered an injury to his left shoulder on January 11, 2002, which arose out of and in the course of his employment with Employer. This is supported by medical opinions and treatment notes in the record. *See, e.g.,* CX 9; CX 12 at 48; CX 15 at 51. Accordingly, Employer must pay for all past and future reasonable treatment of Claimant's work-related injury.

ORDER

It is hereby **ORDERED** that:

1. Employer shall pay Claimant compensation for temporary total disability from January 12, 2002 through October 18, 2002, based on an average weekly wage of $1,365.75.

[19] $27.68 is 98.22569% of $28.18. $1,387.80 x .9822569 =$1,363.18.

2. Employer shall pay Claimant compensation for temporary partial disability from October 19, 2002 through February 13, 2003, based on the difference between an average weekly wage of $1,365.75 and a post-injury wage-earning capacity of $1,363.18.

3. Employer shall pay Claimant compensation for permanent partial disability from February 14, 2003 and continuing into the future, based on the difference between an average weekly wage of $1,365.75 and a post-injury wage-earning capacity of $1,363.18.

4. Employer shall provide all past and future medical care which is reasonable and necessary for the treatment of Claimant's work-related injury.

5. Employer shall pay interest on each unpaid installment of compensation at the rates prescribed under the provisions of 28 U.S.C. §1961.

6. Employer shall receive credit for all compensation previously paid to Claimant.

7. The District Director shall make all calculations necessary to carry out this Order.

8. Counsel for Claimant shall prepare and serve an initial Petition for Fees and Costs on the undersigned and on Employer's Counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Employer's Counsel shall initiate a verbal discussion with Claimant's Counsel in an effort to amicably resolve any dispute concerning the amount requested. If Employer's Counsel and Claimant's Counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If they fail to amicably resolve all of their disputes, Claimant's Counsel shall, within 30 calendar days after the service of the initial fee petition, provide the undersigned and Employer's Counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussion with Employer's Counsel, and shall set forth in the Final Application the final amounts requested as fees and costs. Within 14 calendar days after service of the Final Application, Employer's Counsel shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, service of a document will be the date it was mailed.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California